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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

WENDY SMOLICH, Plaintiff and Appellant, v. MERITAGE HOMES OF CALIFORNIA, INC., Defendant and Respondent.	C062058 (Super. Ct. No. SCV20090)

Plaintiff Wendy Smolich appeals from a judgment on the pleadings in favor of defendant Meritage Homes of California, Inc. Plaintiff contends she alleged viable claims for breach of contract and misrepresentation, in that defendant induced her to purchase a home adjacent to a noisy lumber sawmill by misrepresenting the mill's operations and concealing or failing to disclose that the mill had an easement "to project noise, dust and odors" onto plaintiff's property. Plaintiff alternatively contends she could amend the complaint to cure its defect. We shall affirm the judgment.[1]

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[1] Defendant asks this court to take judicial notice of (1) the recorded mill easement, (2) recorded final subdivision maps, (3) recorded covenants, conditions and restrictions (CC&Rs), (4) plaintiff's grant deed, (5) plaintiff's purchase agreement, (6)

BACKGROUND

On October 11, 2006, plaintiff filed a complaint for breach of contract, negligent misrepresentation, and intentional misrepresentation. The complaint contains class action allegations, but no issue about class certification is presented on appeal.

The complaint alleged that in April 2005 plaintiff purchased from defendant a home in the Foskett Ranch development in Lincoln and has lived there since November 2005. Plaintiff alleged defendant knew Foskett Ranch abutted the Sierra Pacific Industries (SPI) lumber sawmill but failed to disclose to plaintiff before her purchase, or at any time, "that the Sawmill ran night shifts and that the noise from its operation would be continuous and disruptive to the quiet enjoyment of her home." Defendant also allegedly failed to disclose that "it had

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pendency of a similar lawsuit filed against defendant by a different homeowner, and (7) pendency of plaintiff's suit against against the lumber mill alleging violations of the easement. We grant defendant's motion for judicial notice of items (1) through (6) and deny the request as to item (7). As to the recorded documents, the trial court took judicial notice of them and plaintiff agrees they are subject to judicial notice, though she claims their contents are subject to conflicting inferences. As to item (5), plaintiff opposes judicial notice of her purchase agreement, claiming inability to verify its authenticity on short notice, but she admits receipt of the critical document -- the disclosure statement disclosing the mill and noise issue. As to item (6), the pending lawsuit by another homeowner (represented by the same attorney who represents plaintiff), on our own motion we take judicial notice of our opinion in the appeal of that case, in which we affirm a judgment of dismissal (on demurrer) in favor of defendant on grounds similar to our disposition of this appeal. (*Mondragon v. Meritage Homes of California, Inc.*, C061606.) We deny as unnecessary judicial notice of item (7), plaintiff's lawsuit against the mill.

expressly bargained away all property-specific legal rights of the future [Foskett Ranch] homeowners to challenge the operations of the Sawmill, by way of granting an easement for noise to the Sawmill with respect to Foskett Ranch." The complaint alleged the only "initial disclosure" made by defendant was: "LUMBER MILL INFORMATION: The eastern boundary of Foskett Ranch is adjacent to the [SPI] lumber mill. Accordingly, the community may be subject to some of the annoyances or inconveniences associated with proximity to lumber mill operations such as noise, heavy vehicular traffic, vibration, or odors." Plaintiff complained this disclosure failed to state that the sawmill noise would continue all night long and be of such a magnitude as to be a constant disruption for residents. Plaintiff also complained the disclosure failed to give notice that homeowners would be unable to sue the sawmill for nuisance because defendant already bargained away their rights by giving the easement. Plaintiff alleged she did not receive "adequate notice" of the noise issues or the easement. The complaint asserted counts for (1) breach of contract, (2) negligent misrepresentation, and (3) intentional misrepresentation.

Defendant filed a cross-complaint against Roe defendants for indemnity and contribution.

Defendant also filed a motion for judgment on the pleadings and request for judicial notice, on the grounds that the complaint failed to state any viable cause of action, in that the easement (granting the mill a limited right "to project

noise, dust and odors" onto Foskett Ranch) was recorded, giving plaintiff constructive notice; the recorded subdivision map gave notice of the easement;[2] the recorded CC&Rs gave notice of the mill and possible noise issues;[3] the complaint failed to allege fraud with specificity; and the complaint could not be amended to state a viable claim. Defendant's motion used as a template the trial court's sustaining of defendant's demurrer in the separate lawsuit filed by another homeowner. (See fn. 1, *ante*.)

Plaintiff opposed the motion, arguing the existence of information in public records did not excuse defendant's concealment/nondisclosure; whether the information was readily accessible to plaintiff must be decided on the evidence; the court could not take judicial notice that the easement was "properly" recorded or that documents gave plaintiff

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[2] The recorded map listed under "DISCLOSURE TO FUTURE OWNERS/RESIDENTS" that "EXISTING PROPERTY TO THE EAST OF THIS SUBDIVISION IS USED AS A LUMBER MILL, INCLUDING STORAGE OF LOGS AND CUTTING/MILLING OF WOOD PRODUCTS, WHICH IS A LEGAL CONFORMING USE. THERE IS THE POTENTIAL INCONVENIENCE RELATED TO NOISE, SMOKE, SOOT, ODORS AND LIGHT. A GRANT OF EASEMENT FOR OPERATION OF A LUMBER MILL (MILL ACTIVITIES) TO [SPI], IS RECORDED IN DOCUMENT NO. 2003-0205966, O.R.P.C."

[3] The CC&Rs stated: "Notice of Lumber Mill in the Vicinity of the Subdivision. The eastern boundary of Foskett Ranch is adjacent to the [SPI] lumber mill. Accordingly, the Subdivision may be subject to some of the annoyances or inconveniences associated with proximity to lumber mill operations such as noise, heavy vehicular traffic, vibrations, or odors. Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what lumber mill annoyances, if any, are associated with the Foskett Ranch development before you complete your purchase of a home in the Subdivision and determine whether they are acceptable to you."

constructive notice; plaintiff could amend to allege "further specific facts" (unspecified in the opposition); and the motion was untimely.

Defendant filed a reply.

On March 12, 2009, the trial court issued a written ruling granting the motion for judgment on the pleadings, without leave to amend. The trial court granted defendant's request for judicial notice of the recorded documents but denied, as unnecessary, judicial notice of the trial court's ruling in the other case (*Mondragon v. Meritage Homes of California, Inc.*, C061606). The court considered new case law in a surreply filed by plaintiff but concluded it did not assist plaintiff. The court said plaintiff's claims failed because she had actual knowledge of the existence of the lumber mill and, at a minimum, had constructive notice of the easement. There were no allegations that defendant falsely stated no easement existed, and there was no reasonable possibility of curing the complaint by amendment.

Plaintiff appeals from the ensuing judgment.

DISCUSSION

I. Standard of Review

"A judgment on the pleadings equates to a judgment entered after the sustaining of a demurrer, and the standard of review is identical." (*Hu v. Silgan Containers Corp.* (1999) 70 Cal.App.4th 1261, 1265.) In evaluating a demurrer, we assume the truth of all material facts properly pleaded in the complaint, unless they are contradicted by facts judicially

noticed, but no such credit is given to pleaded contentions or legal conclusions. (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1371 (*Alfaro*).) We apply de novo review and must affirm the judgment if the complaint fails to state a cause of action under any possible legal theory. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The trial court's denial of leave to amend the complaint is reviewable under an abuse of discretion standard and will be upheld if the plaintiff fails to show a reasonable possibility of amending the complaint to cure the defect. (*Ibid.*)

II. Plaintiff has no Viable Claims against Defendant

Plaintiff argues defendant breached legal duties and committed fraud inducing her to buy the home by concealing the mill easement and the extent of the noise. We shall conclude plaintiff has no viable claims.

Plaintiff claims on appeal that defendant violated statutory duties of disclosure imposed by Civil Code sections 1102[4] (et seq.) and 2079,[5] as well as a common law duty of disclosure. However, her complaint did not allege any statutory

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[4] In transactions governed by Civil Code section 1102, the seller of real property shall deliver to the prospective buyer a written disclosure statement disclosing conditions of the property, including easements and neighborhood noise problems. (Civ. Code, §§ 1102.1, 1102.2, 1102.3, 1102.6.)

[5] Civil Code section 2079 imposes on real estate brokers or salesperson in certain situations the duty to inspect the property and disclose to prospective purchasers "all facts materially affecting the value or desirability of the property that an investigation would reveal . . . ."

violation, nor does she seek leave to amend or show she could amend to allege applicability of the statutes.

As to the alleged breach of a common law duty, *Calemine v. Samuelson* (2009) 171 Cal.App.4th 153 (*Calemine*) explained the common law duty: "'In the context of a real estate transaction, "it is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property . . . and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer."'" (*Id.* at p. 161.) Undisclosed facts are material if they would have a significant and measurable effect on market value. (*Ibid.*) "A seller's duty of disclosure is limited to material facts; once the essential facts are disclosed a seller is not under a duty to provide details that would merely serve to elaborate on the disclosed facts. [Citation.] Where a seller fails to disclose a material fact, he may be subject to liability 'for mere nondisclosure since his conduct in the transaction amounts to a representation of the nonexistence of the facts which he has failed to disclose [citation].' [Citation.]" (*Ibid.*, italics omitted.)

Plaintiff claims her allegations present questions of fact inappropriate for judgment on the pleadings. She cites *Calemine*'s statement that a partial disclosure may create a question of fact. (*Calemine, supra,* 171 Cal.App.4th 153, 165.) However, in *Calemine* there was an undisputed failure by the seller to disclose prior lawsuits against the developer and a

flooring company regarding water intrusion into the home. The seller disclosed the water problems but not the prior lawsuits, asserting he believed he was required to disclose pending lawsuits only. (*Id.* at pp. 164-165.) The appellate court reversed a summary judgment due to triable issues regarding common law materiality of the prior lawsuits, which were not within the buyer's diligent attention. (*Id.* at pp. 164-166.)

Here, defendant gave plaintiff a disclosure statement (fn. 1, *ante*), which told her the property was adjacent to the mill and accordingly "may be subject to some of the annoyances or inconveniences associated with proximity to lumber mill operations such as noise, heavy vehicular traffic, vibrations, or odors." The disclosure statement also told plaintiff, "Recorded easements for utilities, storm drainage, water and sanitary sewers, right-of-way, landscape *and other purposes* are shown on the title report and the recorded subdivision map." (Italics added.) Thus, defendant disclosed the mill, warned it might be an annoyance, and advised that recorded easements for utilities, etc., "and other purposes" were shown in the recorded subdivision map.

Additionally, the fact of the recorded easement was clearly within the reach of the diligent attention and observation of plaintiff. Thus, plaintiff had actual notice of the mill operations and constructive notice of the mill easement. Actual notice is "express information of a fact," while constructive notice is notice imputed by law. (Civ. Code, § 18.) "Every person who has actual notice of circumstances sufficient to put

a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." (Civ. Code, § 19.)

Plaintiff argues that, although constructive notice may be considered in analyzing a disclosure duty, the question whether the recording of an encumbrance satisfies that duty is generally a question of fact. She cites *Alfaro, supra*, 171 Cal.App.4th 1356, for the proposition that a seller must show the buyer had actual notice of a recorded encumbrance in order to avoid a trial. However, we see no such statement in the lengthy *Alfaro* opinion (*id.* pp. 1363-1398), which we discuss *post*, and plaintiff provides no jump cite to the location of any such statement. Elsewhere in her brief, plaintiff asserts that *Alfaro* at page 1395 said the plaintiffs must have actual notice. However, that portion of *Alfaro* was discussing the question of when fraud was discovered so as to start the statute of limitations.

"[T]he recording of a deed restriction is ordinarily regarded as imparting constructive notice of its contents to subsequent purchasers. (Civ. Code, § 1213 . . . .) . . . 'Constructive notice is "the equivalent of actual knowledge; i.e., knowledge of its contents is conclusively presumed."'" (*Alfaro, supra*, 171 Cal.App.4th at p. 1385, italics omitted.) "Actual notice is 'express information of a fact . . . .' (Civ. Code, § 18, subd. 1.) 'Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to

a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.' (Civ. Code, § 19 . . .)" (*Alfaro, supra*, 171 Cal.App.4th at p. 1389.)

Plaintiff argues the subdivision map did not disclose the easement but rather constituted a directive creating a duty in defendant to disclose the easement. However, we see nothing in the subdivision map requiring defendant to do anything. Rather, the subdivision map itself made the disclosure, under the heading "NOTES," as follows: "7. DISCLOSURE TO FUTURE OWNERS/RESIDENTS: . . . [¶] (D) EXISTING PROPERTY TO THE EAST OF THIS SUBDIVISION IS USED AS A LUMBER MILL, INCLUDING STORAGE OF LOGS AND CUTTING/MILLING OF WOOD PRODUCTS, WHICH IS A LEGAL CONFORMING USE. THERE IS THE POTENTIAL INCONVENIENCE RELATED TO NOISE, SMOKE, SOOT, ODORS AND LIGHT. A GRANT OF EASEMENT FOR OPERATION OF A LUMBER MILL (MILL ACTIVITIES) TO [SPI], IS RECORDED IN DOCUMENT NO. 2003-0205966, O.R.P.C."

Defendant's disclosure that recorded easements "for other purposes" were shown on the recorded subdivision map (which expressly mentioned the sawmill easement) satisfied defendant's duty of disclosure. Thus, this court held in *Stevenson v. Baum* (1998) 65 Cal.App.4th 159 (*Stevenson*), that a seller of a mobile home park, by warning the buyers in the purchase contract that they took title free of easements "other than those of record," satisfied his duty of disclosure and put them on notice of facts ascertainable from the public records. (*Id.* at p. 166.) The buyers were aware (from a title policy) that an oil company had

a recorded easement for ingress and egress, but the title policy failed to mention that the easement was also for pipelines purposes -- a fact clearly stated in the public records. (*Id.* at p. 161.) We affirmed summary judgment in favor of the seller, rejecting the buyers' argument that the seller had a common law duty to disclose the pipeline's existence and actual location. (*Id.* at p. 165.) The seller could be liable only if he failed to disclose any material information known to him which he knew was not known to the buyers and not within the reach of their diligent attention. (*Ibid.*) The pipeline's existence and location were easily ascertainable from the public records. (*Id.* at p. 166.)

The buyers in *Stevenson, supra*, 65 Cal.App.4th at page 166, argued constructive notice of matters of record is not a defense to fraud, citing *Seeger v. Odell* (1941) 18 Cal.2d 409. *Stevenson* said *Seeger* was distinguishable. In *Seeger* the defendants falsely told the elderly, unsophisticated plaintiffs that the plaintiffs' land had been sold to some of the defendants at an execution sale, so as to induce the plaintiffs to execute a lease with another defendant. In truth, no sale had occurred. Had the plaintiffs known this fact, which was ascertainable from public records *not* easily accessible to them, they would not have entered into the lease. *Stevenson* said, "*Seeger* is a case of active, affirmative, intentional misrepresentation, not the mere alleged failure to disclose; moreover, *Seeger* did not involve facts which were just as

accessible to the plaintiff as to the defendant." (*Stevenson*, *supra*, 65 Cal.App.4th at pp. 166-167.)

Although plaintiff argues this court should not take judicial notice that the mill easement was *properly* recorded, she presents no facts or argument that the easement was improperly recorded, nor does she present any authority that defendant's motion could not succeed unless defendant affirmatively established proper recording by evidence other than the fact of the recording.

Plaintiff argues that, unlike *Stevenson*, she did not have actual notice of the easement. She claims she had notice of the mill operations only, not the easement itself. Plaintiff thinks *Stevenson*'s holding is merely that a buyer who has actual notice of an easement also has constructive notice of its contents. We disagree. The holding of *Stevenson* is that, absent fraud, the seller has no duty to disclose publicly recorded facts easily ascertainable to the buyer.

Plaintiff suggests defendant's concealment and affirmative misrepresentations preclude defendant from relying on the public recordings. We disagree.

Alfaro, supra, 171 Cal.App.4th at page 1385, said the fact that a person had constructive notice of the truth from public records is no defense to fraud. The existence of such public records may be relevant to whether a victim's reliance was justifiable, but it is not, by itself, conclusive. (*Id.* at pp. 1385-1386.) Nevertheless, "though defrauded buyers will not be deemed to have constructive notice of public records, this does

not insulate them from evidence of their actual knowledge of the contents of documents presented to them *or from being charged with inquiry notice based on those documents*." (*Id.* at p. 1389.)

Fraud may be based on concealment such as nondisclosure when a person has a duty to disclose. (*Reed v. King* (1983) 145 Cal.App.3d 261, 265 [seller may have duty to disclose that home was site of multiple murder].)

Plaintiff cites *Alfaro, supra*, 171 Cal.App.4th 1356, which involved a restrictive covenant. Buyers in *Alfaro*, who bought homes from community organizations through a low-income housing program that required buyers to invest time and labor, claimed they did not learn of a deed restriction requiring that the homes remain affordable to low and moderate income people, until after the buyers had invested their time and labor. (*Id.* at p. 1364.) The buyers did not seek to rescind but sought to invalidate the restriction or obtain damages. (*Id.* at pp. 1364, 1383.) Some but not all of the grant deeds expressly referred to the recorded deed restriction. (*Id.* at pp. 1366-1368, 1375.) The appellate court (1) affirmed the dismissal following demurrer as to the buyers whose grant deeds referenced the restriction but (2) reversed the dismissal following demurrer as to the buyers whose grant deeds did not expressly reference the restriction. The latter group could not invalidate the deed restriction but may be entitled to damages if they could prove they were induced to perform labor by the failure to disclose. (*Id.* at pp. 1393, 1395.) Their "constructive notice of the deed

restriction by virtue of its recording does not preclude them from seeking damages based on the allegation that they were induced to labor for months by defendants' failure to disclose its existence." (*Id.* at p. 1393.)

Alfaro, supra, 171 Cal.App.4th 1356, said a claim of fraud may arise when the defendant makes a representation likely to mislead absent a disclosure, when there is active concealment, or when one party has sole knowledge or access to material facts and knows these facts are not known to or reasonably discoverable by the other party. (*Id.* at p. 1382.) A seller of real property has a common law duty to disclose where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of, the buyer. (*Ibid.*) The seller is required to disclose the fact affecting the property's value, not to explain why that fact affects the value. (*Id.* at p. 1383.) "[T]hough defrauded buyers will not be deemed to have constructive notice of public records, this does not insulate them from evidence of their actual knowledge of the contents of documents presented to them or from being charged with inquiry notice based on those documents." (*Id.* at p. 1389.)

Here, defendant's nondisclosure of the easement will not support actionable fraud, because plaintiff is charged with inquiry notice based on the documents defendant presented to her. (*Alfaro, supra*, 171 Cal.App.4th at p. 1389.)

Plaintiff argues that (unlike *Stevenson, supra*, 65 Cal.App.4th 159) this case involved not mere nondisclosure but also affirmative misrepresentations, because (1) the CC&Rs expressly stated easements for some purposes (e.g., utilities) while omitting mention of the mill easement, and (2) defendant said there was "some" noise but failed to disclose the mill ran loudly at night. However, plaintiff does not claim that defendant affirmatively stated there was no mill easement or no night noise. Moreover, the facts were easily within the reach of the diligent attention and observation of plaintiff, and thus she has no viable claim for misrepresentation.

Plaintiff cites *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, which held the existence of publicly available information did not necessarily preclude a fraud claim. There, a corporation's lawyer allegedly concealed from a shareholder (in a company being acquired) "toxic" terms relevant to a merger transaction. Before the transaction was completed, the toxic terms were disclosed in a certificate the corporation filed with the Delaware Secretary of State. The appellate court said the sustaining of a demurrer was improper because factual questions existed as to whether a consent form signed by the plaintiff, which mentioned a certificate would be filed, made the toxic terms reasonably accessible to the plaintiff. (*Id.* at p. 295.) *Vega* does not help plaintiff, because here the existence of the easement and the extent of the noise were reasonably accessible to plaintiff.

We conclude the trial court properly granted defendant's motion for judgment on the pleadings.

Plaintiff argues this court should grant her leave to amend. However, the burden is on plaintiff to show a reasonable possibility of curing the complaint's defects (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081), and she fails to do so.

Plaintiff says she "is now aware that after she purchased her home, another potential buyer asked about any problems with noise from the mill. [Defendant's] sales representative told that potential buyer that all the homes with noise problems had been sold, indicating that [defendant] knew [plaintiff's] home had a noise problem." This illogical assertion does not save the complaint.

Plaintiff says she could add an allegation that, before the close of escrow, her husband asked defendant's salesperson how much noise comes from the mill, and the salesperson said the noise was about the same as he could hear at the time he asked the question. He asked the question during the daytime. After plaintiff moved in, she discovered the noise was substantially louder at night. Plaintiff quotes from *Alexander v. McKnight* (1992) 7 Cal.App.4th 973 (*Alexander*), that the presence in a neighborhood of an "overtly hostile family who delights in tormenting their neighbors with unexpected noises or unending parties is not a matter which will ordinarily come to the attention of a buyer viewing the property at a time carefully

selected by the seller to correspond with an anticipated lull" in the activity. (*Id.* at p. 977.)

However, *Alexander, supra,* 7 Cal.App.4th 973, 977, applied the principle that where the seller knows of facts materially affecting the property's desirability "which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer . . . ." (*Ibid.*) That principle is inapplicable here, where the noise was obvious and within the reach of plaintiff's diligent attention. Moreover, any person with any common sense would realize that individual tolerance to noise will vary from person to person. *Alexander* does not apply.

Plaintiff argues she could amend the complaint to allege that defendant failed to disclose that the subdivision was in violation of development conditions regarding sound mitigation, in that defendant failed to build a sound wall, as required by the City, to reduce the mill noise. Plaintiff cites *Barder v. McClung* (1949) 93 Cal.App.2d 692, 697, as upholding a judgment finding a seller liable for fraud for failing to disclose that part of the house violated zoning ordinances. The defendants/sellers had obtained building permits for living space in the garage building and the original work complied with the permits. (*Id.* at p. 693.) Two years later, the defendants had extended the garage and added a kitchen without obtaining a permit. (*Ibid.*) In *Barder*, there was no indication that the

undisclosed information was readily available to the buyer from recorded documents. (*Id.* at p. 697.) The buyer's personal inspection of the property was not a defense, because the fact that the house violated the ordinance was not visible and was known only to the seller, and the seller knew the fact of the violation was not within the reach of the diligent observation and attention of the buyer. (*Ibid.*)

However, plaintiff does not claim she can allege that a sound wall imposed as a condition during the development of the property would still be required since the grant of the easement.

Plaintiff claims she can allege the easement was not properly recorded because it did not appear on "their" title report. However, preliminary title reports have limited significance. (*Alfaro, supra*, 171 Cal.App.4th at p. 1389, citing Ins. Code, §§ 12340.10 et seq.) They are offers to issue a title policy subject to stated exceptions; they are not abstracts of title, i.e., a written listing of all recorded conveyances affecting the chain of title. (Ins. Code, §§ 12340.10-12340.11.) The reports serve to apprise the prospective insured of the state of title against which the insurer is willing to issue a title insurance policy. (*Alfaro, supra*, 171 Cal.App.4th at p. 1389.) Thus, a flaw in a preliminary title report would not save plaintiff's complaint.

Plaintiff's reply brief offers a more extensive list of allegations she would like to add by amendment. Even though a request for leave to amend may be made for the first time on

appeal, we may disregard new points raised for the first time in a reply brief. (*Alfaro, supra*, 171 Cal.App.4th at p. 1394, fn. 23.)

We conclude the trial court properly entered judgment on the pleadings in favor of defendant, and plaintiff fails to show a possibility of saving the complaint by amendment.

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1)-(2).)

SIMS, J.

We concur:

SCOTLAND, P. J.

CANTIL-SAKAUYE, J.